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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9401

CONSUMER FEDERATION OF AMERICA, *et al.*,
Petitioners,

v.

EARL L. BUTZ, *Secretary, Department of Agriculture, et al.,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
and
SUGGESTION FOR SUMMARY REVERSAL

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT and SUGGESTION FOR SUMMARY REVERSAL

The Consumer Federation of America, National Consumers League, Americans For Democratic Action – Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutter and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO), and American Federation of Teachers (AFL-CIO), plaintiffs-appellees in the proceedings below, petition for a writ of certiorari to review the

Judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the District Court is reported at 395 F.Supp. 923 and is reproduced in Appendix A hereto along with its unreported Order. The opinion of the Court of Appeals is not yet reported but is reproduced in Appendix B hereto. The Order of the Court of Appeals Denying Rehearing and Rehearing En Banc is reproduced in Appendix C hereto along with the Petition for Rehearing With Suggestion For Rehearing En Banc filed by petitioners.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 14, 1975. A timely Petition for Rehearing With a Suggestion For Rehearing En Banc, was denied by Order of the Court of Appeals on December 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When a party prevailing in the District Court seeks only an affirmance of the judgment below without any

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[1] In addition to Earl L. Butz, Secretary of the United States Department of Agriculture, respondents are Erwin L. Peterson, Administrator of the United States Department of Agriculture, Andrew Rot, Supervisor of the Meat Grading Branch of the United States Department of Agriculture at Omaha, Nebraska and American National Cattlemen's Association, appellants below, as well as Independent Meat Packers Association, National Association of Meat Purveyors, National Livestock Feeders Association and National Restaurant Association, appellees below.

enlargement in the scope of relief, does that party lose its right to offer alternative grounds for affirmance which were not relied on by the lower court if it does not file a cross-appeal?

STATUTES INVOLVED

The Agricultural Marketing Act of 1946, as amended, 7 U.S.C. §1622, provides in pertinent part:

The Secretary of Agriculture is directed and authorized:

* * *

(b) To determine costs of marketing agricultural products in their various forms through the various channels and to foster and assist in the development and establishment of more efficient marketing methods (including analyses of methods and proposed methods), practices, and facilities, for the purpose of bringing about more efficient and orderly marketing, and reducing the price spread between the producer and the consumer.

* * *

(c) To develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.

* * *

(h) To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in

> interstate commerce . . . to the end that . . . consumers may be able to obtain the quality product which they desire . . . .

STATEMENT OF THE CASE

Petitioners are a coalition of national consumer groups and labor organizations who obtained an Order from the United States District Court for the District of Nebraska permanently enjoining implementation of certain regulations promulgated by the United States Department of Agriculture ("USDA"). On appeal, the decision of the District Court was reversed by the United States Court of Appeals for the Eighth Circuit, but in reviewing the lower court decision, the Court of Appeals refused to consider any of the grounds for affirmance offered by petitioners other than those relied on by the lower court. The Court of Appeals held that even though petitioners were granted all the relief they requested, they could not make alternative arguments in support of the lower court decision without filing a cross-appeal. The unambiguous precedents of this Court, however, and even of the Eighth Circuit itself, hold that in cases such as this, when appellees seek nothing more than affirmance of a lower court decision, they may present all of their arguments in support of the lower court judgment without filing a cross-appeal. Because the Court of Appeals declined to follow this firmly established rule of law, and did not consider the arguments advanced by petitioners in support of the District Court decision, petitioners request this Court to exercise its power of supervision over the lower courts and to remand this action to the Court of Appeals with instructions to give plenary consideration to the grounds for affirmance offered by petitioners.

A. STATEMENT OF FACTS

The regulations challenged by petitioners are revisions to the standards used by USDA to grade most of the beef sold to consumers in this country. The beef-grading program, which is administered by respondent Secretary of Agriculture under the Agricultural Marketing Act of 1946, as amended, 7 U.S.C. §1621 *et seq.*, was intended, *inter alia*, to keep consumer prices down and to promote consistency and uniformity of quality so that consumers would be better able to identify and obtain the particular qualities of beef that they desired. *See* 7 U.S.C. §§1622(b), (c) and (h), pp. 3-4, *supra*. In order to accomplish this, USDA has established various grades which measure beef quality, the most significant of which are the familiar "Choice" and "Prime" grades that consumers and all others in the beef industry have come to rely on over the years as indicators of high quality beef. Moreover, because beef quality is directly related to production costs, the quality grades have also come to serve a pricing function, with "Choice" and "Prime" beef commanding the highest consumer prices. In addition to the quality grading portion of the beef-grading program, USDA also "yield grades" beef in order to indicate the amount of retail cuts that can be obtained from a given carcass. Yield grades are often used as marketing devices within the beef industry, but unlike the quality grades, they are of no direct use to consumers.

The regulations at issue are revisions to both the quality and yield grading portions of the beef grading program.[2] Because the yield grade revisions do not directly

[2] The technical aspects of the quality and yield grading standards are not relevant to this petition. The old standards are, however, set out at 7 C.F.R. §§53.102, 53.104, 53.105 and 53.203-53.206 (1975), and the revisions are set out at 40 *Fed. Reg.* 11535 (March 12, 1975).

affect consumers, petitioners have challenged only the quality grading revisions, claiming that they violate the Agricultural Marketing Act in two specific respects. First, the producers ("cattlemen") will benefit from lower production costs as a result of the revisions, but these production cost savings will not be passed on to consumers. This would violate 7 U.S.C. §1622(b) by increasing the price spread between producers and consumers of beef, thereby increasing the cattlemen's profits at the consumers' expense. This is precisely what happened in 1965, the last time that the quality grade revisions were changed, and USDA has never given any indication as to why this would not happen again under the new revisions. Second, the result of that part of the revisions lowering the quality requirements for beef in the "Choice" and "Prime" grades, will undermine consistency and uniformity within these grades, thereby making it more difficult for consumers to obtain the particular qualities of beef they desire. This would violate 7 U.S.C. §§1622(c) and (h), cause consumer confusion, and alter consumer expectations that have developed over the years with respect to the "Choice" and "Prime" grades.[3]

B. PROCEEDINGS BELOW

After filing both timely comments and a formal petition with USDA in an attempt to prevent implementation

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[3] Petitioners also argued that the revisions were arbitrary and capricious because the objectives of the revisions could be accomplished without these defects, because the consumers' interests could have been better protected, and because the revisions were the result of frequent *ex parte* communications between the cattlemen and high USDA officials.

of the quality grade revisions, petitioners intervened as plaintiffs in the District Court action filed by the Independent Meat Packers Association against USDA to enjoin implementation of the revisions. Trade associations from all other segments of the beef industry except the cattlemen also intervened as plaintiffs and sought to invalidate the revisions.[4] The cattlemen's trade association, which was the only group in favor of the revisions, intervened on the side of USDA as a defendant, arguing that they were losing money each day that implementation of the revisions was delayed.

The District Court issued a preliminary injunction, which was upheld by the Court of Appeals, 514 F.2d 1119 (8th Cir. 1975), and then, after conducting a trial, it permanently enjoined implementation of both the quality and yield grading portions of the revisions. (A. 23). The Court held that the revisions as a whole were invalid because USDA had not prepared an adequate inflationary impact statement pursuant to Executive Order No. 11821, 39 *Fed. Reg.* 41501 (Nov. 29, 1974), an argument asserted by the plaintiff trade associations, but not relied on by petitioners. As a result of this holding, the District Court never formally reached petitioners' two-pronged assertion that the quality grading portion of the revisions exceeded USDA's statutory authority. The Court did, however, seem to accept petitioners' section 1622(b) price-spread argument, finding as a fact that "*[t]here is, however, no evidence in the administrative record indicating*

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[4] Plaintiff Independent Meat Packers Association filed suit primarily to enjoin implementation of the yield grading portion of the revisions. The other trade associations that had intervened as plaintiffs argued that both the quality and yield grading portions of the revisions were invalid.

a factual basis for the Department's conclusion that prices would drop at the retail level." (Finding 16, A. 15, emphasis in original).[5] With respect to the consumer confusion argument, however, the District Court cited several technical studies and found as a fact that they provided "substantial evidence" to support the lowering of the quality grade requirements. (Finding 5, A. 9).[6]

The Court of Appeals reversed the District Court decision, finding that USDA's failure to prepare an adequate inflationary impact statement was not a sufficient basis for invalidating the revisions. Although the reviewing court would normally have gone on to consider the price-spread and consumer-confusion arguments offered by petitioners as alternative bases for affirming the District Court decision, the Court of Appeals here refused to consider these grounds for affirmance, stating that because petitioners had not filed a cross-appeal, their alternative arguments were not properly before the Court. (B. 18). In so doing, the Court of Appeals focused exclusively on the District Court's "substantial evidence" finding, without mentioning any of the findings that were favorable to petitioners, and without mentioning the fact that the

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[5] It is undisputed that production costs will drop under the revisions. Therefore, if retail prices do not also drop, the price spread will be increased in violation of section 1622(b). This finding alone would have been a sufficient basis for affirmance of the District Court decision if the Court of Appeals had not refused to consider it on review.

[6] Although the District Court found theoretical support for the lower quality requirements, it is by no means clear that the Court thereby intended to reject petitioners' consumer-confusion argument, for the Court also made a specific finding that USDA had not considered the actual effect that the revisions would have on consumer desires – a factor which must be considered under 7 U.S.C. §1622(h). (Findings 14 & 21, A.14 & 17).

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District Court had granted petitioners' all the relief that they had requested.

Petitioners then filed a petition for rehearing, pointing out that despite the "substantial evidence" finding, the District Court had ultimately ruled in their favor on the quality grading portion of the revisions, thereby eliminating any need for a cross-appeal. (C. 2-4). Nevertheless, the Court of Appeals summarily denied the petition for rehearing, along with those filed by the other appellees, and thus never considered any of the grounds offered by petitioners in support of the District Court decision (C. 7).

REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari in order to correct what appears to have been an inadvertent error by the Court of Appeals, yet one which was quite serious and apparently outcome-determinative. To the extent that the Court of Appeals intended to announce a new principle of law, however, this Court should review the Court of Appeals' decision because it is in direct conflict with the law as established by this Court.

I. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT A CLEAR ERROR OF LAW MADE BY THE COURT OF APPEALS.

A series of decisions by this Court have firmly established that an appellee may offer any arguments appearing in the record as a basis for affirming the judgment below without filing a cross-appeal as long as a mere affirmance is sought without any enlargement in the scope of relief granted. This is true not only when the contentions urged by the appellees were relied on by the lower court,

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but even when the lower court ignored or rejected those contentions. *United States v. American Ry Express Co.*, 265 U.S. 425, 435 (1924); *Anderson v. Atherton*, 302 U.S. 643 (1937); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1956).[7] *See also* 9 Moore, J. & Ward, B., *Federal Practice* ¶ 204.11[3] (2d Ed. 1973). *See, generally*, Stern, Robert L., *When to Cross Appeal or Cross Petition — Certainty or Confusion*, 87 Harv. L. Rev. 763 (1974). The cases decided in the Eighth Circuit are in accord. *E.g., Hadfield v. Ryan Equipment Co.*, 456 F.2d 1218, 1222 (8th Cir. 1972); *Chicago, Burlington & Quincy R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268 (8th Cir. 1973). Even *Tiedeman v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 513 F.2d 1267, 1272 (8th Cir. 1975), the only case cited by the Court of Appeals in support of its holding that petitioners were required to file a cross-appeal, is fully consistent with the other authorities, holding that appellees are *not* required to cross-appeal under the circumstances present in this case. The only relevant question is, then, whether petitioners were granted the relief they sought from the District Court, not whether any or all of the theories they asserted were accepted by that court.

There can be no doubt that petitioners were granted the relief they requested – an injunction preventing implementation of the quality grade revisions – for the District Court opinion states:

> In conclusion, the Court finds instances wherein the action of the United States Department of

[7] These cases cite numerous other Supreme Court cases which support the proposition.

> Agriculture, in promulgating revisions to rules found at 7 C.F.R. §§ 53.102, 53.104, 53.105 and 53.203 to 53.206 [the yield *and* quality grading regulations], was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," entitling plaintiffs to injunctive relief pursuant to 5 U.S.C. § 706(2)(A). [A.23].[8]

However, because the opinion of the District Court contained the phrase "substantial evidence" in its discussion of the technical aspects of the revisions, the Court of Appeals erroneously concluded that the lower court had ruled against petitioners on the entire quality grading portion of the revisions:

> Finding "substantial evidence" to support the new quality grade standards, the district court resolved this issue favorable [sic] to appellants. Because appellees failed to file a cross-appeal, they may not now claim that the new quality grade regulations are without sufficient evidentiary support. See *Tiedeman v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 513 F.2d 1267, 1272 (8th Cir. 1975). Consequently, the sole issue for our consideration is whether under the applicable standard of review there was an adequate basis in the administrative record for the revised yield grade regulations. [B. 18, footnotes omitted].[9]

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[8] The actual Order of the District Court was equally unambiguous, enjoining implementation of those sections of the USDA regulations which contained both the quality and yield grading revisions. (*See* A. 24-25).

[9] *See also*, B. 9-10.

The rest of the Court of Appeals' opinion was devoted to a discussion of the yield grading revisions and to the proper scope of review.[10] The Court of Appeals apparently failed to realize that the District Court had invalidated the quality grade revisions as well as the yield grade revisions because of USDA's inadequate inflationary impact statement. As a result, the Court of Appeals erroneously refused to consider petitioners' alternative grounds for affirmance because petitioners had not cross-appealed.

Although the Court of Appeals' error in precluding petitioners from arguing in support of the District Court's quality grading decision seems to have been an inadvertent one based on a misunderstanding of the lower court opinion, it was, nevertheless, a serious error that appears to have been outcome-determinative. Petitioners price-spread argument, which the District Court seemed to accept, provided a sound basis for affirming the lower court decision. By refusing to consider that ground for affirmance, however, the Court of Appeals reversed a lower court decision which should properly have been affirmed. Consequently, this Court should exercise its supervisory power and remand this case to the Court of Appeals with instructions to fully consider the arguments offered by petitioners in support of the District Court decision.[11]

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[10] The Court of Appeals held that the trial conducted by the District Court was not authorized by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, but this holding did not affect petitioners' claims since their arguments for affirmance, including the section 1622(b) price-spread argument, were based primarily on defects in the administrative record.

[11] Although petitioners have herein emphasized their argument that the revisions violated 7 U.S.C. § 1622(b), they have by no

(continued)

II. IF THE LAW IS TO BE CHANGED SO THAT AN APPELLEE MUST FILE A CROSS-APPEAL IN ORDER TO ARGUE ALTERNATIVE GROUNDS TO SUPPORT A LOWER COURT JUDGMENT, SUCH A CHANGE SHOULD BE BASED ON A DECISION OF THIS COURT.

While petitioners believe that the Court of Appeals' refusal to consider their arguments resulted from a mere mistake in interpretation of the District Court Order, it must be noted that in their petition for rehearing, petitioners alerted the Court of Appeals to both this mistake in interpretation and to the controlling precedents of both this Court and of the Eighth Circuit. (C. 2-4). The fact that the Court of Appeals denied that petition, albeit without opinion, raises the possibility that it intended to announce a novel proposition of law concerning the circumstances under which appellees must file cross-appeals. If this is the case, the Court of Appeals decision should be reviewed by this Court. That decision is so inconsistent with every other authority found by petitioners, that an appellee can no longer be certain of when a cross-appeal must be filed. Moreover, the question of law involved, which affects every civil action filed in a U.S. Court of Appeals, is so important that this Court should reconcile the conflict existing between the Court of Appeals decision and every other case that has considered this issue.

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[11] (continued) means abandoned the arguments that 7 U.S.C. §§ 1622(c) and (h) were violated and that the revisions were arbitrary and capricious. The Court of Appeals was, of course, also required to consider these alternative grounds for affirmance of the District Court decision. *See* pp. 9-10, *supra.*

SUGGESTION FOR SUMMARY REVERSAL

Because the Court of Appeals' refusal to consider any of the alternative grounds offered by petitioners for affirmance of the District Court decision was contrary to all controlling authorities, including those of the Eighth Circuit itself, petitioners suggest that summary reversal is appropriate in this case.

CONCLUSION

For the foregoing reasons this Court should grant certiorari and remand the present case to the Court of Appeals for plenary consideration of the grounds offered by petitioners for affirmance of the District Court decision.

Respectfully submitted,

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Dated: January 2, 1976

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

INDEPENDENT MEAT PACKERS ASSOCIATION, an unincorporated association,

Plaintiff,

NATIONAL ASSOCIATION OF MEAT PURVEYORS, an unincorporated association,

Plaintiff-Intervenor,

NATIONAL LIVESTOCK FEEDERS ASSOCIATION,

Plaintiff-Intervenor,

NATIONAL RESTAURANT ASSOCIATION,

Plaintiff-Intervenor,

CONSUMER FEDERATION OF AMERICA, NATIONAL CONSUMERS LEAGUE, AMERICANS FOR DEMOCRATIC ACTION, CONSUMER AFFAIRS COMMITTEE, NATIONAL CONSUMERS CONGRESS, PUBLIC CITIZEN, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA (AFL-CIO), SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO), AMERICAN FEDERATION OF TEACHERS (AFL-CIO),

Plaintiff-Intervenors,

vs

EARL L. BUTZ, individually and in his capacity as United

CIVIL NO. 75-0-105

MEMORANDUM

States Secretary of Agriculture;
ERWIN L. PETERSON, individually
and in his capacity as Administrator of the United States
Department of Agriculture; and
ANDREW ROT, individually and
in his capacity as Supervisor
of the Meat Grading Branch
of the United States Department of Agriculture at Omaha,
Nebraska,

Defendants,

AMERICAN NATIONAL CATTLEMEN'S
ASSOCIATION, a corporation,

Defendants-Intervenor.

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DENNEY, District Judge

This matter comes before the Court for decision subsequent to a hearing held from May 12, 1975 to May 23, 1975. Jurisdiction is founded under 7 U.S.C. § 1621 *et seq.*, 28 U.S.C. § 1331, 5 U.S.C. §§ 702 and 706, and 28 U.S.C. § 1337.

In this action, filed April 1, 1975, plaintiffs seek declaratory and injunctive relief from the promulgation and enforcement of Department of Agriculture rules revising the grading standards for beef. After a hearing on plaintiff's motion for a preliminary injunction, the Court, on April 11, 1975, granted interlocutory relief for the reasons stated in the Court's Memorandum dated April 11, 1975. The order granting the preliminary injunction was appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed on April 15, 1975, but instructed this Court to conduct:

> . . . a plenary hearing on the request for a permanent injunction and that a final decision of the District Court be rendered within 45 days of this order . . . .

In addition, the Eighth Circuit Court of Appeals instructed this Court to reexamine the adequacy of the bond pursuant to F.R.Civ. P. 65. Thereafter, on April 18, 1975, this Court conducted a hearing on the adequacy of the bond and it was ordered increased from $5,000 to $10,000, due to the high costs of "dialy copy" and the likelihood of an expedited appeal.

Since these early proceedings, the Court has permitted four groups to intervene as plaintiffs, and one group

to intervene as a defendant. No other motions to intervene were filed, although the Court is aware of actions subsequently filed in other Federal District Courts alleging the same general cause of action.

In accordance with F.R.Civ.P. 52, the Court makes the following findings of fact:

1. Grade standards for beef were originally promulgated in 1926, in which marbling (the size and disperson of flecks of fat within the meat) was recognized as a major factor in evaluating quality. The first major revision of the grades in 1939 established physiological maturity as an important additional factor in evaluating quality. As a very general rule, increases in marbling have a beneficial effect on quality, while increases in maturity have a deleterious effect on quality. Eight grades are currently used to identify these quality differences – prime, choice, good, standard, commercial, utility, cutter and canner. Uniform palatability (a measure of the tenderness, juiciness and flavor) is the goal of quality grading. In 1965, an additional method of grading was added to identify carcasses and wholesale cuts for their relative yield of retail cuts. This method is called yield grading and consists of five numerical grades (1 through 5), with 1 indicating beef that will yield a high percenage of retail cuts (e.g., lean cattle having minimal fat deposits).

2. Both quality and yield grading have been optional. For example, a packing house could have some of its carcasses quality graded, others yield graded, and yet others both quality and yield graded. At present, approximately 40% of slaughtered cattle are quality graded. Of these,

approximately 70% fall in the choice category, 7-8% fall in the prime cateogry, and 22% fall within the good grade. Although the standards for the lower grades (standard, commercial, etc.) are used in the industry as guidelines, very few such carcasses are officially graded due to the expense of grading. Of cattle that are quality graded, approximately 50% are also yield graded.

3. On September 11, 1974, the Agricultural Marketing Service of the United States Department of Agriculture published a notice and draft of revisions to the grades. 7 C.F.R. §§53.100-53.105; 7 C.F.R. §§53.201-53.206, 39 Fed. Reg. 32743 (Sept. 11, 1974).

4. The proposed rules differed from the old rules in several aspects.

a. Conformation (the shape of the carcass as compared to an ideal shape) was eliminated as a factor in determining quality grade.

b. When officially graded, all carcasses would be identified for both quality grade and yield grade (except for bull carcasses, which are insignificant in number).

c. In the "A maturity" range (young cattle from 9 to 30 months old in age), maturity was eliminated as a factor in determining quality grade. The marbling requirements in the A matuirty range were set at the loweset level of marbling previously acceptable within the particular grade.

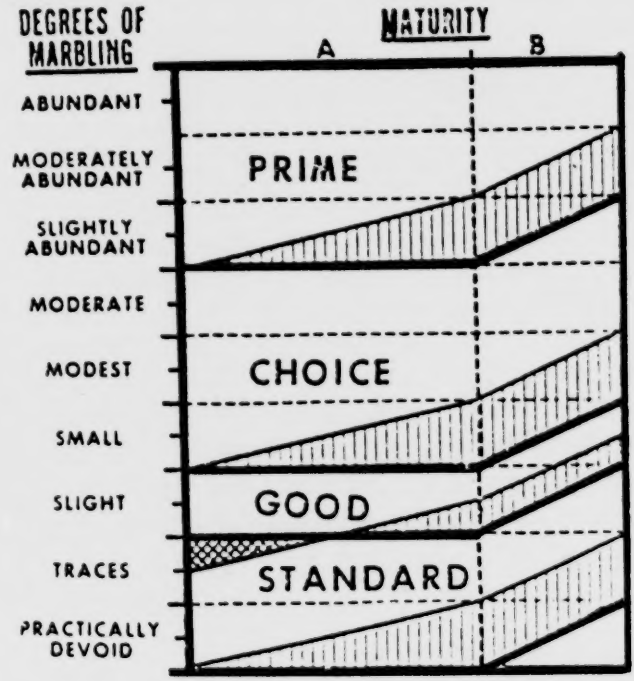
d. In the "B maturity" range (older cattle from 32 to 48 months old in age), the marbling

requirements were reduced one full "degree of marbling" for prime and choice.

Item "c" above is of particular importance, as it involves two decisions. The elimination of maturity as a factor implies that the old formula was in error. Under the old standards, as the maturity increased, the palatability increased. The bottom line of a grade should, of course, indicate uniform palatability along the line. Once the Department decided to correct the bottom lines of the grades within the A maturity range, it was faced with a second decision: whether to set the new standard at the lowest palatability acceptable under the old standards, to set the new standard at the higher palatability required of the more mature cattle in the "A" range, or to set the new standard somewhere in between. The department chose to set the new standard at the lowest palatability previously acceptable in that grade. Thus, under the new standards, the consumer will receive "choice" graded meat having a palatability no worse than the minimum palatability possible under the old standards for "choice."

A. 8

PROPOSED CHANGES IN THE RELATIONSHIP BETWEEN MARBLING, MATURITY, AND QUALITY GRADE



5. The Court has examined the following references cited by the Department in the Statement of Considerations preceding the rules 40 Fed.Reg. 11535:

a. Berry *et al.*, (J. Animal Science 38:507)

b. Romans *et al.*, (J. Animal Science 24:681)

c. Breidenstein, (J. Animal Science 27:1532)

d. McBee and Wiles, (J. Animal Science 26:701)

e. Covington *et al.*, (J. Animal Science 30:191)

f. Norris *et al.*, (J. Food Science 36:440)

These references convince the Court that the Department had substantial evidence upon which to decide to change the maturity-marbling relationship, and to fix that change at the levels reflected in the new rules.

6. The comments received by the Department were very extensive, and in the light most favorable to the defendants were as follows:

a. Approximately 40% of the comments opposed the change in the marbling-maturity requirements.

b. Approximately 25% of the comments opposed the requirement of compulsory yield grading.

c. There was no significant opposition to the elimination of conformation as a factor in quality grading.

7. Executive Order Number 11821, 39 Fed. Reg. 41501, was signed on November 27, 1974.

8. During the earlier proceedings in this Court, all parties represented that Exhibit B to Defendants' Objections

to Issuance of a Preliminary Injunction (Filing No. 4) was the inflationary impact statement required by Executive Order 11821. In the Court's prior Memorandum, the Court stated its doubt that this document was sufficient. The Court has been subsequently informed that counsels' assertion was in error. The Eighth Circuit Court of Appeals was apparently also misinformed on this fact. The Court recognizes that counsels' error was unintentional and no doubt caused by the speed at which this lawsuit progressed. By way of clarification, there are three documents of interest:

a. An "inflation impact evaluation" which is prepared by the agency before taking "major" action.

b. A "summary" of the inflation impact statement which is prepared by the agency and forwarded to the Office of Management and Budget (See Exhibit No. 6, ¶ 5(d)).

c. A "certification" that the inflationary impact has been studied, which must accompany the rules. In this case, the certification was included at the end of the rules as promulgated, 40 F.R. 11535.

The "summary" required in (b) above is Exhibit No. 901, a letter from E.L. Peterson (Administrator, Agricultural Marketing Service) to Don Paarlberg (Director Agricultural Economics) which was received by Mr. Paarlberg on March 6, 1975, and forwarded to the Council on Wage Price Stability. This was the document the Court thought was the impact statement itself.

The Court has not been presented with the "evaluation" itself. However, Exhibit No. 901 contains the following statement:

> An analysis of the economic impact of the grade change proposal was made by the Commodity Economics Division, Economic Research Service. While the primary thrust of the study was not directed at assessing the inflationary impact of the proposal, its authors found that most of the supportive reasons for the proposal have a foundation in economics and actual practice. Principal inflation-related findings, as reported in a December 1974 Supplement to the Livestock and Meat Situation Report (Exhibit No. 3) included: . . .

9. Executive Order 11821 requires a consideration of the following inflation related factors:

a. Cost impact on consumers, businesses, markets, or Federal, State or Local Government.

b. Effect on productivity of wage earners, businesses or governments at any level.

c. Effect on competition.

d. Effect on supplies of important products or services.

Circular No. A-107 (Exhibit No. 6) implementing the executive order, required the appointment of a "compliance officer"; such was not done until March 18, 1975. The Court does not view this delay as substantive, but the fact that a compliance officer was not appointed until after the final promulgation of the rules on March 12,

1975, indicates a serious disregard of the requirements of the executive order.

10. Exhibit No. 3, contains an analysis of the following pertinent factors:

a. The potential of compulsory yield grading to improve pricing accuracy.

b. The probable lowering of price to the consumer of choice grade meat if the supply thereof should "increase dramatically."

c. That retailers will probably have to adjust their buying practices – especially if they had been marketing ungraded "good" meat under a house brand.

d. That packers may find it necessary to be more selective in their buying practices to account for the premium placed on yield grades.

e. That feeders can expect to "feed to choice" in fewer days.

f. That beef production will increase in efficiency.

g. That cattle will be marketed at lower weights, necessitating more cattle to meet demand.

h. That the feed needs of the extra cattle described above would be supplied by the feed saved by feeding for fewer days.

11. Under the old regulations, quality grading was done by official United States Department of Agriculture Graders.

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For this service, the packing house was charged $14.60/ hour. The graders grade approximately 70 carcasses per hour – thus the cost of grading a carcass is approximately $.20 for a typical 600 pound carcass; quality grading costs $.033¢ per pound. This cost reflects only the U.S.D.A. fees for the quality grading. In addition to these fees. the packinghouse must employ a "rollerman" who applies the stamps under the direction and control of the official grader. The rollerman is not employed by the U.S.D.A.; rather, he is furnished by the packinghouse to assist the official grader and thereby reduce the time (and fees charged) for the grading. Rollermen typically earn approximately $5.00/hour.

The Court finds that the plaintiffs' grading costs will roughly double under the new regulations. Other packers will experience higher costs, the exact amount depending on the proportion of their output that has been yield graded under the old regulations. While the price per pound is relatively insignificant, the high volume of meat processed results in a significant cost to the packer. (See Exhibit No. 21).

12. Under the old regulations, quality grade marks were hand stamped on the carcass in four locations. Each grader used a stamp which included his initials. To indicate "good" the grader would place one stamp in each of the four locations. "Choice" was indicated by two hand stamps in each of the four locations. Likewise, "prime" required three stamps in each of the four locations. Once the grader had stamped the carcass, the rollerman would apply the rollermarks to each side of the carcass. The yield grade was hand stamped in four locations on the carcass.

Under the new regulations, there are two methods of grading, the first of which is intended for packing plants

using a "rail" (an overhead rail from which the carcasses are hung and moved manually to work stations). This method requires that the grader hand stamp for quality in two locations and for yield grade in ten locations. The rollermarkings are applied in the usual manner and indicate only the quality grade.

The second method under the new regulations is designed for packing plants using a "chain" (similar to a "rail", but where the carcasses are moved automatically to the workstations). The grader hand stamps for quality in two locations, and for yield in two locations. This method uses a rollermark containing both quality and yield marks. (See Exhibits No. 902-905).

Under the old regulations, it was mandatory to rollermark the brisket, while under the new regulations that is optional.

13. The Court finds that the plaintiffs will suffer more than Ten Thousand Dollars ($10,000.00) in increased costs, due to increased grading expense, exclusive of interest and costs, should the regulations in question become effective. (See Exhibit No. 21).

14. There is evidence before the Court, although not in the administrative record, that consumer preference closely parallels "palatability", as that term is defined by the Department. All of the Department's research was in terms of "palatability" (as determined by trained taste panels and various mechanical tests for shear forces and the like) – *there was no recent research relating to what actual consumers desire.* In sum, the Department hypothesized a consumer whose only desire was palatability – and then tested for palatability. While this is not a totally

unreasonable assumption, the Court finds no evidence in support, save Exhibit No. 25, a test conducted in 1961.

15. Several cities require that all meat sold at the retail level be quality graded. One such city is Chicago, where a significant proportion of the plaintiffs' output is sold.

16. Although not in the administrative record, the Court was presented with evidence derived from U.S.D.A. publications to the effect that there was a slight increase in retail price following the change in the regulations in June, 1965. In addition, the same data shows a substantial increase in the proportion of meat falling in the "choice" grade. The 1965 changes in marbling maturity relationship were similar in direction and degree to the proposed regulations in issue in this case. The Court does not give this evidence great weight, due to the complex economic factors which determine retail meat prices. *There is, however, no evidence in the administrative record indicating a factual basis for the Department's conclusion that prices would drop at the retail level.* The Supplement to the Livestock and Meat Situation (December 1974), Exhibit No. 3, concluded that:

> The consumer could be indirectly affected by a lower relative price of choice if the supply of choice should increase dramatically due to the change, and by lower prices in general if efficiency of the industry is improved.

The Court finds this conclusion deserving of little weight, as it is based on meager facts, simplistic economic reasoning, and is contradicted by the past experience of the 1965 changes.

17. Immediately after a head of cattle is killed and the hide removed, it is inspected for health and sanitation purposes; *see*, 21 U.S.C. §601 *et seq.* At this time, the inspector, a U.S.D.A. official, often requires that grubs and bruises be cut out of the exterior fat covering. If more than a minor amount of fat is removed, yield grading is not permitted, as the fat thickness is an important factor in the yield grade equation. For reference, that equation is:

$$Y = 2.5 + 2.5T + .2P + .0038W - .32A$$

where

Y = Yield Grade (Decimal digits dropped, not rounded - e.g. 2.9 becomes 2)
T = Adjusted thickness of fat over ribeye (inches)
P = Percent kidney, pelvic and heart fat
W = Hot carcass weight (lbs.)
A = Area of ribeye (square inches)

Under the old regulations, even if extensive amounts of fat were trimmed, the carcass was eligible for quality grading. The new regulations prohibit any grading in such a situation.

Some packers customarily trim fat while the carcass is on the kill floor. This trimming involves at most 10 lbs/head and is done to improve the appearance of the carcass.

18. Cattle feeders customarily sell to packinghouses on a "live weight basis", meaning that a buyer examines the live cattle and agrees to pay a certain price per pound of live weight. Occasionally, cattle are sold on a "grade and yield basis", whereby the purchase price is dependent on the quality and yield grades of the carcass, as determined after the cattle is slaughtered and dressed. *There is no*

evidence in the administrative record, or otherwise, that the practice of selling on a live weight basis will change.

19. Cattle buyers are adept at assessing the yield grade of live cattle, and consider yield grades when arriving at an average price per pound (live weight basis) of a pen of cattle.

20. For carcasses of the same quality grade, there is a price spread between carcasses having different yield grades. This price spread varies, depending on market conditions, and the exact figures are published on a daily basis in readily available market newsletters and the like. (See Exhibit No. 31).

21. *There is no evidence which directly, or by inference, tends to show that consumer preferences will be reflected back through marketing channels to producers to a greater extent* under the new regulations.

CONCLUSIONS OF LAW

In accordance with F.R.Civ.P. 52(a), the Court makes the following conclusions of law. Before the trial of this case, motions for summary judgment were made by Consumer Federation of America, *et al.* (Filing No. 54); Earl L. Butz, *et al.*, (Filing No. 57); American National Cattlemens Association (Filing No. 59); and the Independent Meat Packers (Filing No. 69). These motions were taken under advisement due to the 45 day limitation imposed on this Court. The decision herein will dispose of the issues raised in the several motions.

The Court finds that it has jurisdiction to hear this matter pursuant to 5 U.S.C. §702, 28 U.S.C. §1331, and

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28 U.S.C. §1337. See *Stark v. Wickard*, 321 U.S. 288, 290 (1944). Plaintiffs have adequately alleged "standing" within the teachings of *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973).

Compulsory Yield Grading

The first substantive issue for consideration pursuant to 5 U.S.C. §706(2)(A), is whether "compulsory yield grading" falls within the authority delegated by Congress. 7 U.S.C. §1622(h) states as follows:

> (The Secretary of Agriculture is directed and authorized) . . . to inspect, certify, and identify the class, quality, quantity and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, *except that no person shall be required to use the service authorized by this subsection* . . . . (Emphasis added).

The defendants contend that "the service" means the collection of all grading standards authorized by this subsection. They conclude that Section 1622(h) permits a regulation requiring that all quality graded meat be also yield graded, and vice-versa. Both the wording of the statute and its legislative history are unclear. When this section

was debated, Congress apparently did not anticipate the possibility of grading for yield. See 46 U.S. Code Cong. Service 1584 (1946); 92 Cong. Rec. 9022-9033 (July 15, 1946).

The Department of Agriculture's own construction of Section 1622(h) is as follows:

> 7 C.F.R. §53.1(p): *Grading Service.* The service established and conducted under the regulations for the determination and certification or other identification of the class grade or other quality of livestock or products under standards.
>
> 7 C.F.R. §53.4: *Kind of Service.* Grading service under the regulations shall consist of the determination and certification and other identification, upon request by the applicant, for the class, grade, or other quality of livestock or products under applicable standards . . . .

Under U.S.D.A. definitions, both the quality and yield standards are considered as measures of "quality". See 7 C.F.R. §53.1(nn) and (mm). Yield grade, which measures the relative proportion of the weight of trimmed retail cuts to the weight of the carcass is more properly a measure of "quantity." Although the Court is aware of the Secretary's definitions to the contrary, and the proper weight to be accorded that definition, the Court finds the Secretary's construction unfounded. The defendants, in their brief, concur in the Court's determination that yield grading is a measure of quantity.

Against this background, the exception in Section 1622 (h) takes on a new light. Essentially, the Department has

placed a precondition on the right to refuse either yield grading or quality grading. Defendants contend that the use of the phrase "the service authorized by this subsection" encompass all possible grading services – that the Department is permitted to "bundle" the services together and require that an applicant take or refuse the entire "bundle". The Court finds this construction of Section 1622(h) erroneous when considered in light of the Department's own definitional regulations, and the voluntary tone of Section 1622. In addition, the Court finds no necessity for compulsory yield grading, as a substantial proportion of all meat is yield graded under the old regulations and no appreciable benefit will result from compulsion. (See Findings No. 18-21).

The Court recognizes that there exists an economic compulsion to have choice grade meat graded as such – the certification as "choice" increases the value of the meat. This form of compulsion is not forbidden by Section 1622(h), and is the type of compulsion that makes a voluntary system viable. It is the tying of yield grade to quality grade which the Court finds in excess of statutory authority.

For these reasons, the regulations relating to compulsory yield grading will be set aside pursuant to 5 U.S.C. §706 (2)(A).

Executive Order No. 11821

The second issue for consideration is the adequacy of the Department's actions relative to Executive Order No. 11821. As stated in *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579, 585 (1952), "The President's power, if any, to issue the order must stem either from an act

of Congress or from the Constitution itself." In this regard, the Court has considered Article II, Section 3, of the United States Constitution, which states as follows:

> (The President) shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . (and) . . . he shall take Care that the Laws be faithfully executed . . . .

This section, by necessity, gives the President the power to gather information on the administration of executive agencies. The information and analysis required by Executive Order No. 11821 would also be helpful in recommending new legislation. The Court has, in addition, considered 7 U.S.C. §1621, the Congressional Declaration of Purpose of the Agricultural Marketing Act of 1946. That section states as follows:

> . . . In order to attain these objectives, it is the intent of Congress to provide for . . . (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed . . . with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner.

This section thus requires much the same analysis of costs and economics as required by the executive order. *Youngstown* is readily distinguishable, as that case involved the seizure of property for public use, an action of magnitude and one in conflict with constitutional principles respecting private property. Here, the executive order is supported by, and not in conflict with, constitutional language, and is within the Congressional purpose of the Agricultural Marketing Act of 1946.

The defendants contend that even if the executive order is valid, it is a mere "housekeeping" order, enforceable only by the President. The Court might be inclined to agree with the defendants' propositon, except for the previously stated Congressional purpose. That statutory directive, combined with the substantive nature of the executive order, convinces the Court that the Order is more than a housekeeping order and falls within the judicial review contemplated by 5 U.S.C. §706. *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Brookhaven Housing Coalition v. Kunzig*, 341 F.Supp. 1026 (E.D. N.Y. 1972).

There is no doubt that the Department's analysis of the inflationary impact did not consider the effect of the new regulations on:

(a) The productivity of wage earners

(b) Competition

(c) Employment

(d) Energy resources

(e) Secondary markets (e.g. grain)

In addition, the Department did not weigh the inflationary impact of the alternative proposals submitted by consumers and others. Nor was there a quantification of those factors the Department did consider. While the Court recognizes that prognostication of inflation is subject to inaccuracies and is at best a difficult task, the Department's conduct falls woefully short of that required by law. In the summary of its analysis, the Department indicated the nature and inadequacies of the analysis with the following language:

> While the primary thrust of the study was not directed at assessing the inflationary impact of the proposal, its authors found that most of the supportive reasons for the proposal have a foundation in economics and actual practice. (See Exhibit No. 901).

These facts convince the Court that there was a material and substantial noncompliance with the mandate of Executive Order No. 11821, and that the proposed regulations should be set aside pursuant to 5 U.S.C. §706(2)(A).

CONCLUSION

In conclusion, the Court finds instances wherein the action of the United States Department of Agriculture, in promulgating revisions to rules found at 7 C.F.R. §§53.102, 53.104, 53.105 and 53.203 to 53.206, was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law", entitling plaintiffs to injunctive relief pursuant to 5 U.S.C. §706(2)(A). See, generally, *CPC International v. Train*, ___ F.2d ___ ; Nos. 74-1447, 1448, 1449; (8 Cir. May 5, 1975).

Although much of this decision rests on uncontroverted facts, there were material issues of fact precluding summary judgment. In addition, the Court required expert testimony to fully understand the content and scope of the proposed regulations.

For these reasons, plaintiffs' prayer for permanent injunctive relief will be granted, and the previously listed motions for summary judgment will be denied by separate order of the Court.

Dated this 29th day of May, 1975.

[Filed May 29, 1975]

* * * * *

ORDER

In accordance with the findings of fact and conclusions of law stated in the Court's Memorandum filed contemporaneously herewith:

IT IS THEREFORE ORDERED that all motions for summary judgment (Filings No. 54, 57, 59 and 69) are denied.

IT IS FURTHER ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and their successors in office, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined from giving force and effect to rules and regulations found in Volume 40, Page 11535, et seq., of the Federal Register, published on March 12, 1975, relating to a revision of the official standards for grades of carcass beef and

the related standards for grades of slaughter cattle (revisions to 7 C.F.R. §§53.102, 53.104, 53.105 and 53.203 to 53.206), and that the preliminary injunction entered by the Court on April 11, 1975 (Filing No. 5), is hereby made permanent.

Dated this 29th day of May, 1975.

BY THE COURT

/s/ Robert V. Denney

Robert V. Denney
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1486

Independent Meat Packers Association, et al.,
Appellees,

v.

Earl L. Butz, Secretary of Agriculture, et al.,
Appellants.

No. 75-1541

Independent Meat Packers Association, et al.,
Appellees,

v.

American National Cattlemen's Association, etc.,
Appellants.

Appeals from the United States District Court for the District of Nebraska.

Submitted: September 11, 1975
Filed: November 14, 1975

Before MATTHES, Senior Circuit Judge, HEANEY and STEPHENSON, Circuit Judges.

MATTHES, Senior Circuit Judge.

These are appeals from an order of the district court* permanently enjoining the implementation and enforcement of regulations promulgated by the United States Department of Agriculture (USDA) pursuant to § 203 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1622.** The regulations revise offficial USDA standards for the grades of carcass beef, 7 C.F.R. §§ 53.102, 53.104-.105 (1975), and related standards for the grades of slaughter cattle, 7 C.F. R. §§ 53.203-.206 (1975). Appellee Independent Meat Packers Association (Packers) initiated this action on April 1, 1975 by filing a complaint seeking declaratory and injunctive relief from that part of the revised regulations providing that beef carcasses submitted for quality grading would be automatically graded for yield; in the alternative, the Packers sought declaratory and injunctive relief from the regulations in their entirety. The named defendants were Earl L. Butz, Secretary of Agriculture, Erwin L. Peterson, Administrator of the Agricultural Marketing Service, USDA, and Andrew Rot, Supervisor of the USDA Meat Grading Branch at Omaha, Nebraska (federal defendants). The Packers claimed that the compulsory yield provision of the new regulations,[1] which were to have taken effect on April 14, 1975, was arbitrary, capricious, "not

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* The Honorable Robert V. Denney.

** The Secretary and other original defendants appealled on July 2, 1975 (No. 75-1486). American National Cattlemen's Association, intervening defendant, *see* page 3, *infra*, appealed on July 23, 1975 (No. 75-1541).

[1] 40 Fed. Reg. 49 (1974).

supported by substantial evidence," and "in excess of the power" of the USDA. They further alleged that the revised regulations were issued in violation of Executive Order No. 11821, which requires an evaluation of the inflationary impact of all major legislative proposals, rules, and regulations emanating from the executive branch.[2] The complaint alleged jurisdiction under 28 U.S.C. §§1331, 1337 and 5 U.S.C. §§702, 706.

After a hearing on the application for a preliminary injunction, the district court, being persuaded that there was a reasonable likelihood of success, issued a preliminary injunction on April 11 enjoining implementation of the revised regulations in their entirety upon the posting of a $5,000 bond.[3] The federal defendants then appealed to this court, which affirmed the district court's order granting the preliminary injunction, but remanded the cause for "a plenary hearing on the request for a permanent injunction" and an expedited decision. *Independent Meat Packers Ass'n v. Butz*, 514 F.2d 1119, 1120 (8th Cir. 1975) (per curiam). The district court subsequently permitted the American National Cattlemen's Association (ANCA) to intervene as a party-defendant and four groups, the Purveyors, Feeders, Restaurants, and Consumers, to intervene as party-

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[2] Executive Order No. 11821 also directs the Director of the Office of Management and Budget to develop criteria for the identification of major legislative proposals, rules, and regulations having a significant impact upon inflation and to prescribe procedures for their evaluation. Pursuant to this mandate, the Office of Management and Budget on January 28, 1975 sent Circular No. A-107, which prescribes guidelines for compliance with the Order, to the heads of all executive departments.

[3] The bond was subsequently ordered increased to $10,000.

plaintiffs.[4] The allegations of plaintiff-intervenors were substantially the same, except that the Consumers contested principally the new standards for identifying beef quality.

Prior to trial the Packers, Consumers, and all defendants filed motions for summary judgment. The federal defendants also moved for an order limiting the scope of the court's inquiry to a review of the administrative record.[5] After a full trial,[6] the district court on May 29, 1975, filed a memorandum opinion incorporating its findings of fact and conclusions of law and an order denying all motions for summary judgment and permanently enjoining enforcement of the revised regulations. *Independent Meat Packers Ass'n v. Butz*, 395 F. Supp. 923 (D.Neb. 1975).

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[4] The Purveyors, Feeders, and Restaurants were represented by the National Association of Meat Purveyors, National Livestock Feeders Association, and the National Restaurant Association. The Consumers were represented by the Consumer Federation of America, the National Consumers League, Americans for Democratic Action, Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO), and the American Federation of Teachers (AFL-CIO).

[5] The court never formally ruled on the government's motion. When the federal defendants argued their motion for summary judgment, however, they retierated their request, which was orally denied from the bench. Tr., vol. 1, at 40-41.

[6] The ten-day trial generated seventeen volumes of testimony and several hundred exhibits.

I.

Resolution of the issues raised in this appeal requires a brief review of the history of the beef grading program currently in force. The USDA inaugurated its voluntary beef grading program in May 1927 without express congressional authorization.[7] To promote a scientific approach to the problems of marketing, transporting and distributing agricultural products,[8] Congress in 1946 passed the Agricultural Marketing Act. Under § 203 of the Act, 7 U.S.C. § 1622(h), the Secretary of Agriculture is authorized to "inspect, certify, and identify the class, quality, quantity, and condition of agricultural products . . . , under such rules and regulations as [he] may prescribe. . . ."[9] Under the beef grading regulations presently in force, 7 C.F.R. §§53.100 *et seq.*, the USDA grades been carcasses on a voluntary fee-for-service basis. Federal graders evaluate beef carcasses for their quality grade and yield grade, but packers may request either one or both of these services. 7 C.F.R. § 53.102(a). The quality grading system presently in effect combines both quantitative and qualitative factors, which are combined to form a final grade. Eight quality grade designations – Prime, Choice, Good,

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[7] United States Department of Agriculture, Agriculture Marketing Service, *Official United States Standards for Grades of Carcass Beef* 2 (1973).

[8] *See* 1946 U.S. Code Cong. Service 1586.

[9] The Secretary is authorized to promulgate regulations "to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no personal shall be required to use [this] service. . ." 7 U.S.C. §1622(h).

Standard, Commercial, Utility, Cutter, and Canner – are applicable to steer and heifer carcasses. The degree of marbling of intramuscular fat[10] and the physiological maturity[11] of the slaughtered cattle are the palatability – indicating characteristics of the beef. Conformation involves the proportion of meat to bone and of high to low value cuts.[12] To some extent, increased marbling compensates for greater physiological maturity, 7 C.F.R. § 53.102(r), and superior conformation compensates for marbling except in the Prime, Choice, and Commercial grades, 7 C.F.R. § 53.102(s).

The yield grade of a beef carcass is determined by considering four factors: the thickness of the external fat, the amount of kidney, pelvic, and heart fat; the area of the ribeye; and the hot carcass weight. 7 C.F.R. § 53.102 (u).[13] USDA yield grade designation represents the percentage of the carcass weight that is made up of boneless,

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10 The degrees of marbling in the order of descending quantity are as follows: abundant, moderately abundant, slightly abundant, moderate, modest, small, slight, traces, and practically devoid. 7 C.F.R. § 53.102(g).

11 The five maturity groups are identified as A, B, C, D, and E, in order of increasing maturity. *Id.*

12 Superior conformation, which is generally reflected in a carcass with a full, well-rounded appearance, means that there is a high proportion of meat to bone and a high proportion of weight in the more valuable parts of the carcass. 7 C.F.R. § 53.115(b)(2).

13 The USDA yield grade is determined on the basis of the following equation: yield grade – 2.50 + (2.50 x adjusted fat thickness, inches) + (0.20 x percent kidney, pelvic, and heart fat) + (0.0038 x hot carcass weight, pounds) – (0.32 x area ribeye, square

(continued)

closely trimmed retail cuts from the round, loin, rib, and chuck.[14] When the USDA introduced yield grading on a voluntary basis in 1965, only 3-1/2 percent of beef submitted for quality grading was also yield graded. Under the voluntary program presently in force, approximately 70 percent is graded for yield.[15]

Acting under the rulemaking power vested in the Secretary of Agriculture by § 203 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1622(h), the USDA followed the notice and comment procedure outlined by § 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c), in promulgating the challenged regulations. First, on September 11, 1974, the USDA filed notice in the Federal Register of proposed changes in standards for grades of carcass beef, 7 C.F.R. §§ 53.102, 53.104-.105, and the standard for slaughter cattle, 7 C.F.R. §§ 53.201-.206. Interested persons were given an opportunity to present written comments, views, and arguments during a ninety-date period

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[13] (continued)
inches). 7 C.F.R. § 53.103(a). Yield grades are designated by the numbers 1 through 5. A carcass typical of its yield provides approximately 2.3 percent more boneless retail cuts from the round, loin, rib, and chuck than the next lower (higher number) yield grade. U.S. Dep't of Agriculture, Economic Research Service, *Proposed Changes in the Relationship Between Marbling, Maturity, and Quality Grade* 3 (Supp. Livestock Meat Situation Dec. 1974).

[14] *See* Cross, *Equations for Estimating Boneless Retail Cut Yields from Beef Carcasses*, 37 J. Animal Science 1267 (1973).

[15] Approximately 55-60 percent of all beef produced is USDA graded for quality.

ending December 10, 1974.[16] Over 4,000 comments and five petitions containing 7,618 signatures were received from a wide cross-section of the public. After minor modifications, the final draft accompanied by a Statement of Considerations was published in the Federal Register on March 12, 1975 with an effective date of April 14, 1975. 40 Fed. Reg. 11535 (1975).

The revised regulations contained four major changes in the standards for grades of carcass beef. First, conformation was eliminated as a factor for determining quality grade. Secondly, all carcasses submitted for grading would be identified for both quality grade and yield grade. Thirdly, having determined that increasing physiological maturity does not affect palatability within the youngest maturity group (cattle nine through thirty months old), the marbling requirements for this group were set at the lowest level previously acceptable in the Prime, Choice, and Standard grades. For the more mature beef in these grades increased marbling is still required to compensate for advancing age, but the minimum degree of marbling required was lowered by one degree. Lastly, to make the Good grade more uniform and restrictive, the Secretary limited this grade to carcasses in the A and B maturity groups and raised the minimum degree of marbling required by one-half degree.

The changes in the relationship between marbling-maturity and quality grades were opposed by most consumers, representatives of restaurants, institutions, their suppliers, and some feeders. Their opposition was based on the

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[16] Although not required by the Administrative Procedure Act, the Department also conducted regional briefings in five cities.

belief that the changes would impair the palatability of Prime and Choice beef and that consumers would have to pay "Choice grade prices for Good grade beef." The requirement that all beef graded be graded for both quality and yield was opposed most strongly by meat packers. They voiced the belief that compulsory yield grading would increase grading costs,[17] impede their ability to market carcasses from which exterior fat had been trimmed, require a complete restructuring of their buying practices, and preclude the grading of certain carcasses. The packers also questioned the accuracy of the USDA yield grade equation, especially its subjective application by federal graders.

The cattlemen endorsed the objectives and principal provisions of the regulations. Their studies and experience convinced them that it would be possible to produce fed beef more economically, using less grain, and a shorter average period in the feed lot. Combining quality and yield grading would reward producers of high yielding beef with premium prices as it would tend to eliminate the use of averages in marketing cattle.

The district court's memorandum opinion, which was designed to provide the basis for the injunction entered on May 29, considered the major contentions voiced by the opposing groups. First, the court found "substantial evidence" to support the changes in the relationship between marbling-maturity and quality grade. 395 F. Supp. at 927. This disposed of the principal challenge of the consumer

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[17] The packers are billed $14.60 per hour for work performed by federal graders during the daytime. 7 C.F.R. § 53.29(a).

group plaintiffs. Secondly, the court held that "compulsory yield grading" falls outside the authority delegated to the Secretary of Agriculture by 7 U.S.C. § 1622(h). The court reasoned that the requirement that all beef submitted for grading be graded for both quality and yield is inconsistent with the voluntary tone of § 1622(h). *Id.* at 931. The court also stated that there was "no necessity for compulsory yield grading" and that "no appreciable benefit [would] result from compulsion." *Id.* Lastly, the court considered the adequacy of the Department's actions relative to Executive Order No. 11821. Being persuaded that the adequacy of compliance with the terms of the executive order was subject to judicial review, *id.* at 932, the court ruled that the Secretary's inflation impact statement was deficient and that, accordingly, the regulations should be set aside in their entirety.

II.

Inasmuch as the USDA's alleged failure to comply with the mandate of Executive Order No. 11821 was the broadest ground upon which the district court's order enjoining implementation of the new regulations was based, we shall consider this issue first. Executive Order No. 11821, 39 Fed. Reg. 41501 (1974), requires the Director of the Office of Management and Budget (OMB) to consider the following factors in developing criteria for identifying legislative proposals, rules, and regulations having potential impact upon inflation: cost impact on consumers, businesses, markets, and government; effect on productivity of wage earners, businesses, and government; effect on competition; and effect on supplies of important products or services. The implementing document, OMB Circular No. A-107,

also requires consideration of the effect on employment and energy supplies or demand. In accordance with Section 5(d) of the OMB circular, the Secretary certified that the Department had evaluated the inflationary impact of the proposed regulations. 40 Fed. Reg. 11535, 11546 (1975), and forwarded a brief summary of the evaluation to the Council on Wage and Price Stability. The district court found this evaluation to be deficient because it did not consider the effect of the new regulations on the productivity of wage earners, competition, employment, energy resources, and secondary markets, weigh the impact of the alternative proposals submitted, or quantify the factors that were considered. 395 F. Supp. at 932.

Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. *See Gnotta v. United States*, 415 F.2d 1271, 1275 (8th Cir. 1969); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n. 1 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 7 (3d Cir. 1964). Executive Order No. 11821, issued by the President on November 27, 1974, cites no specific source of authority other than the "Constitution and laws of the United States." The district court found that the Order was authorized by § 202 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621.[18] We disagree. The

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[18] Section 202 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621, reads in pertinent part as follows:

> The Congress declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to

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broad language of § 202 simply states the policy objectives of the Act. The district court additionally relied on article II, § 3 of the Constitution, which states that "[the President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; . . . [and] he shall take Care that the Laws be faithfully executed . . ." This provision alone does not give the executive order the force and effect of law. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) completely refutes the claim that the President may act as a lawmaker in the absence of a delegation of authority or mandate from Congress. Appellees contend that the Order was authorized by § 3(a) of the Council on Wage and Price Stability Act, 12

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[18] (continued)
the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote . . . a scientific approach to the problems of marketing, transportation, and distribution of agricultural products . . . so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for . . . (3) an integrated administration of all laws enacted by Congres to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed . . . with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner.

U.S.C. § 1904,[19] which authorizes the President to establish a Council on Wage and Price Stability with the power to monitor the economy and to appraise the inflationary impact of federal programs and policies. We need not determine, however, what role Congress contemplated for the

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[19] The Wage and Price Stability Act, 12 U.S.C. § 1904 (Supp. 1975) reads in pertinent part as follows:

Section 3(a) The Council shall –

(1) review and analyze industrial capacity, demand, supply, and the effect of economic concentration and anti-competitive practices, and supply in various sectors of the economy, working with the industrial groups concerned and appropriate governmental agencies to encourage price restraint;

(2) work with labor and management in the various sectors of the economy having special economic problems, as well as with appropriate government agencies, to improve the structure of collective bargaining and the performance of those sectors in restraining prices;

(3) improve wage and price data bases for the various sectors of the economy to improve collective bargaining and encourage price restraint;

(4) conduct public hearings necessary to provide for public scrutiny of inflationary problems in various sectors of the economy;

(5) focus attention on the need to increase productivity in both the public and private sectors of the economy;

(6) monitor the economy as a whole by acquiring as appropriate, reports on wages, costs, productivity, prices, sales, profits, imports, and exports; and

(7) review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation.

President under the Act[20] because, in our view, Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action. *See Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) (per curiam); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965). Even if appellees could show that the Order has the force and effect of law, they would still have to demonstrate that it was intended to create a private right of action.[21] *See Acevedo v. Nassau County*, 500 F.2d 1078, 1083-84 (2d Cir. 1974); *Kuhl v. Hampton*, *supra* at 342; *Farkas v. Texas Instrument, Inc.*, *supra* at 632-33; *Farmer v. Philadelphia Electric Co.*, *supra* at 9; *see also Gnotta v. United*

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20 The language of the Act is silent with respect to the President's role other than his authority to appoint the members and chairman of the council. The brief legislative history suggests, however, that "[t]he provisions embodied in the . . . Act represent a license by the Congress to the President to exercise his influence to arrest the inflational spiral." 120 Cong. Rec. 15,245 (daily ed. Aug. 19, 1974) (remarks of Senator Tower). *See generally id.* at 15, 244-57, 15,261-62, 15,266-80, 15,283-87; *id.* at 8754-56 (daily ed. Aug. 20, 1974).

21 We have grave doubts as to whether under Executive Order No. 11821 appellees have standing to judicially challenge the adequacy of the impact statement. Under the test enunciated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970), appellees must allege that they have suffered an "injury in fact" and that they seek to protect an interest "arguably within the zone of interests to be practiced [sic] or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. Appellees fail to satisfy

(continued)

States, supra at 1275.[22] Executive Order No. 11821 does not expressly grant such a right. To infer a private right of action here creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.

In summary, we conclude that the President did not undertake or intend to create any role for the judiciary in the implementation of Executive Order No. 11821. We hold, therefore, that the district court erroneously set aside the revised regulations in their entirety because of alleged deficiencies in the impact statement.

III.

Appellants assert that the district court's conclusion that the USDA exceeded its statutory authority in promulgating the disputed regulations is plainly wrong. Specifically, the court found the compulsory yield provision of the new regulations, 40 Fed. Reg. at 11538, which requires that all beef submitted for grading be graded for both quality and yield, to be inconsistent with the voluntary tone of 7 U.S.C. § 1622(h), 395 F. Supp. at 931.

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21 (continued)
the "zone of interests" facet of the constitutional test of standing. As we have noted, the purpose of the Executive Order is to help implement the President's personal economic policies. Appellees have not shown that the order was designed for their benefit. *Cf. Acevedo v. Nassau County, supra* at 1082-83.

22 *Contra, Chambers v. United States,* 451 F.2d 1045 (Ct. Cl. 1971).

As we have seen, under § 1622(h) the Secretary is directed and authorized to "inspect, certify, and identify the class, quality, quantity, and condition of agricultural products . . . under such rules and regulations as [he] may prescribe." Section 1622(h) specifically provides that no person be required to use the "service authorized by this subsection." The Secretary urges that this language permits him to bundle the Department's grading services together and thus require applicants to either take or refuse the entire bundle.

We turn, then, to an analysis of the statute. In matters of statutory construction, we are guided by "the provisions of the whole law, and . . . its object and policy." *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1111-12 (8th Cir. 1973), *citing Richards v. United States*, 369 U.S. 1, 11 (1962). "The practical inquiry in litigation is usually to determine what a particular provision, clause, or word means," but to answer it one must refer to the "leading idea or purpose of the whole instrument." 2 J. Sutherland, Statutory Construction § 4703, at 336 (3d ed. 1943). The principal purpose of the Agricultural Marketing Act of 1946 was "to promote through research, study, experimentation, and, . . . cooperation among Federal and State agencies, farm organizations, and private industries, a scientific approach to the problems of marketing, transport[ing] and distribut[ing] . . . agricultural products." 1946 U.S. Code Cong. Service 1586. To effectuate the purposes of the Act, Congress in § 1622 delegated a broad range of duties to the Secretary of Agriculture relating to agricultural products.[23] The emphasis the Act places on a

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[23] Under §§1622(c) and 1622(h), the following goals are relevant: (1) to develop and improve standards of quality, condition, quantity, (continued)

scientific approach to solving the problems of the industry suggests that Congress intended the Secretary to freely use his expertise. Consideration of the literal meaning of the words employed sheds additional light on the subject. The key language is "service authorized by this subsection." It is presumed that Congress has used a word in its usual and well-settled sense. *See Community Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969). The use of the term "service" in the singular rather than the plural form supports the Secretary's theory that he can offer the Department's beef grading services as a single "package." For the foregoing reasons, we conclude that the Secretary is authorized to use his expertise to combine the Department's beef grading services so long as the program as a whole facilitates the congressional goals set forth in §1622 (c) and § 1622(h).

IV.

This brings us to an analysis of the substantive merits of the new regulations. Appellees contended at trial and assert here that the USDA acted arbitrarily and capriciously in promulgating the revised regulations. They specified three respects in which, in their view, the "compulsory yield" provision was defective. In addition to the issues previously discussed, their complaints focused upon prac-

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[23] (continued)
and grade to encourage uniformity and consistency in commercial practice; (2) to market agricultural products to the best advantage; (3) to facilitate the trading of agricultural products; and (4) to make available quality products to consumers.

tical problems inherent in compulsory yield grading, its alleged ineffectiveness, inflationary impact, and asserted inaccuracies in the USDA yield grade formula currently used. They also launched a multi-faceted attack on the new quality grade standards, especially its effect on the palatability of beef and the price of Choice graded beef. Finding "substantial evidence" to support the new quality grade standards, the district court resolved this issue favorable to appellants. Because appellees failed to file a cross-appeal, they may not now claim that the new quality grade regulations are without sufficient evidentiary support. *See Tiedeman v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 513 F.2d 1267, 1272 (8th Cir. 1975).[24] Consequently, the sole issue for our consideration is whether under the applicable standard of review there was an adequate basis in the administrative record for the revised yield grade regulations.[25] Ordinarily, we would remand this matter to the trial court for consideration of of the alleged arbitrariness of the regulation, but it is not necessary to do so in this case because the complete administrative record and the transcript of the trial court proceedings are before us. *See Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 301 (8th Cir. 1972).

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[24] Appellees' citation of Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc., 419 U.S. 281, 284 (1974), holding that agency findings based on substantial evidence may "nonetheless reflect arbitrary and capricious action," is inapposite.

[25] The trial court never reached this question. Its order enjoining implementation of the new regulations was based solely on questions of statutory authority and compliance with the Executive Order. *See* II and III, *supra*.

Appellees concede that under the guidelines enunciated in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and *Camp v. Pitts*, 411 U.S. 138 (1973), the appropriate standard of review for regulations promulgated pursuant to the "notice and comment" procedure of the Administrative Procedure Act, 5 U.S.C. § 553(c) (informal rulemaking) is that specified by 5 U.S.C. § 706(2)(A), which authorizes a reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] *See National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 700-01 (2d Cir. 1975); *National Tire Dealers Ass'n, Inc. v. Brinegar*, 491 F.2d 31, 34-35 (D.C. Cir. 1974); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1005 (1st Cir. 1973); *Boating Industry Ass'n v. Boyd*, 409 F.2d 408 411 (7th Cir. 1969).[27] Under the arbitrary and capricious standard of review, the reviewing court is to engage in a substantial inquiry into the facts, but is not empowered to substitute its judgment for that of the expert agency. The court is to consider only whether the disputed regulations were based on "consideration of the relevant factors" or whether there was a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* at 416. *See CPC International v. Train*, 515 F.2d 1032, 1044 (8th Cir. 1975). To have the regulations promulgated pursuant to

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[26] We have already held, under II and III, *supra*, that the agency action was "otherwise in accordance with law."

[27] *See also* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 622n.19 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 749 (1972); *contra*, Chrysler Corp. v. Department of Transportation, 472 F.2d 659, 669 (6th Cir. 1972) (applying substantial evidence test).

the notice and comment procedure of § 553(c) set aside, the opponents must prove that the regulations are without rational support in the record. *See First Nat'l Bank v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974). The reviewing court's inquiry into the facts is further circumscribed by language in *Overton Park* prohibiting *de novo* review except when agency action is adjudicatory in nature and agency factfinding procedures are inadequate, or when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. 401 U.S. at 415. The parties agree that neither situation exists here. Their dispute focuses rather on the extent to which a reviewing court in conducting the "plenary review" mandated by *Overton Park* can go outside the administrative record to hear expert testimony on the merits of the disputed regulations.[28]

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[28] In *Overton Park* the court stated

> [t]hat [plenary] review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.
>
> The court may require the administrative officials who participated in the decision to give testimony explaining their action . . . . [W]here there are administrative findings that were made at the same time as the decision, . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may

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Our consideration of the transcript of the trial court proceedings and the District Judge's memorandum opinion convince us that the district court, while sometimes articulating the correct standard of review, nonetheless exceeded the narrow limits imposed by *Overton Park*.[29] The district

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[28] (continued)

be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings . . . that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "*post hoc* rationalization" and thus must be viewed critically. If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

401 U.S. at 420-21 (citations omitted).

[29] THE COURT: I can tell you right now that I am not going to substitute my judgment for the Secretary, because he has more expertise in this than I do.

All I am going to inquire into is whether he did act within the scope of his authority under the Act and also whether he acted arbitrarily and capriciously.

Tr., vol. 1, at 54.

THE COURT: I don't intend to have a de novo review.... I want to know if there is substantial evidence to back up whether or not the Secretary acted arbitrarily and capriciously.

Tr., vol. 1, at 47.

5. The Court has examined the following references . . . . These references convince the Court that the Department had *substantial evidence* upon which to change the maturity-marbling relationship. . . .

395 F. Supp. at 927.

court conducted a ten day evidentiary hearing during which it heard the expert testimony of private individuals and USDA officials on the merits of the regulations and, on the basis of that testimony, independently weighed the evidence and reached its own conclusions. In these respects the district court erred.[30] For example, in concluding that the Packers' grading costs would roughly double under the new regulations, 395 F. Supp. at 928, the district court apparently rejected testimony by David Hallett, Chief of the Meat Grading Branch, USDA and Andrew Rot, Supervisor of the Meat Grading Branch at Omaha, Nebraska, that any increase would be immaterial. Addressing itself to the merits of the new yield grade regulations, the district court found "no necessity for compulsory yield grading" and that "no appreciable benefit [would] result from compulsion." 395 F. Supp. at 931. The full administrative record, which included numerous research studies and over 4,000 comments, and the Department's construction of the evidence, were before the district court. The expert testimony heard at trial offered little that was new. In our view, unless an inadequate evidentiary development before the agency can be shown and supplemental information submitted by the agency does not provide an adequate basis for judicial

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[30] Appellees' contention that appellants waived their right to object to the admission of evidence in addition to the material contained in the administrative record is without merit. At the outset appellants requested the trial court to limit the scope of the inquiry. Only after this request was denied did trial counsel, as a precautionary measure, call expert witnesses to testify on the merits of the regulations. Even if we were to assume that appellants did in fact consent to a trial *de novo*, the result is the same. As we have noted, the district court was not empowered to conduct a *de novo* review.

review, the court in conducting the plenary review mandated by *Overton Park* should limit its inquiry to the administrative record already in existence supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, note 27 *supra; National Nutritional Foods Ass'n v. Weinberger, supra* at 701; *Bradley v. Weinberger*, 483 F.2d 410, 415 (1st Cir. 1973).

We proceed to an independent examination of the record to determine whether the Department acted arbitrarily or capriciously in promulgating the regulation. The principal thrust of appellees' argument is that because of alleged inaccuracies in the USDA yield grade equation and its subjective application by USDA graders, compulsory yield grading will not achieve its purposes – to force the wholesale market for beef and cattle to reflect the full retail sales value differences associated with differences in yield. 40 Fed. Reg. at 11536. USDA statistics indicate that for Choice beef carcasses there is between a $5.00 and $6.00 per hundred weight difference in value between adjacent yield grades. Tr., vol. 11, at 1272-73. Under current marketing practices, approximately 75 percent of slaughter cattle is purchased and paid for on a live weight basis. Because the packer-buyer uses a system of averages to bid for a pen of slaughter cattle, producers presently have little incentive to increase the production of high-yielding slaughter cattle. Tr., vol. 13, at 1478-91. It is the Department's view that if the producers were paid a substantial premium for beef carcasses qualifying for yield grades 1 and 2, they would respond by providing leaner beef with less waste. 40 Fed. Reg. at 11536. The administrative record shows and the Secretary concluded that because cattle being slaughtered today are younger and heavier

than those marketed when the original yield grade study was made in the late 1950's,[31] the prediction equation currently used may tend to underestimate actual retail yield in certain carcasses, particularly among the "exotic" breeds. We note, however, that a number of research studies contained in the administrative files indicate that the yield grade system is the most accurate method of estimating retail yield that is both economical and practical for use on a daily basis.[32] Appellees also question the usefulness of compulsory yield grading in light of the fact that, as we have noted, cattle are generally purchased on the hoof rather than on a carcass grade and weight basis. The yield grade stamps are not applied until the cattle are slaughtered, skinned, cleaned, and chilled for approximately twenty-four hours. Thus under existing buying practices the full use of yield grading as a pricing mechanism requires that the packer-buyer be able to subjectively evaluate

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31 Murphey, *Estimating Yields of Retail Cuts from Beef Carcasses*, 19 J. Animal Science 1240 (1960).

32 *See, e.g.*, Defendant's Exhibit 616 (variables used in the yield grade equation appear to be the most acceptable among those reported when accuracy, speed, and expense are considered; Defendant's Exhibit 662 (prediction equation using the same factors as those used in the USDA equations predicted percent boneless steak and roast meat with a multiple correlation of 0.97); Defendant's Exhibit 666 (equations containing the variables used in the USDA equation resulted in the highest coefficients of multiple determination for percent of boneless steak and roast meat); Defendant's Exhibit 670 (yield grade is most accurate method for predicting carcass composition, percent fat, and protein that can be readily applied by graders in a slaughter facility on large numbers of animals); Defendant's Exhibit 672 (USDA equation, with a simple correlation coefficient of 0.83, is one of the three most useful equations for predicting retail yield).

the retail yield of live cattle with a fair degree of accuracy. Studies by Wilson,[33] Gregory,[34] and Crouse,[35] tend to support the Department's position that subjective live appraisal by trained personnel has predictive value. Appellees place great emphasis on the fact that, in practice, federal graders estimate three of the four factors used in the yield grade equation by means of visual observation. We cannot say, however, that the subjective application of the yield grade equation substantially impairs its accuracy. Under USDA regulations the amount of external fat on a carcass is evaluated in terms of the thickness of the fat over the ribeye, but this measurement must be adjusted to reflect uneven deposition of fat on the carcass. 7 C.F.R. § 53.102(v). The regulations permit and provide for the adjustment which, as a practical matter, must be subjective. *Id.* The fact that no packer or other financially interested party has ever used the Department's appeals procedure to appeal a yield grade determination[36] convinces us that subjective evaluation of yield grades is not a real problem.

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33 Defendant's Exhibit 601 (concluding that fat thickness, which is the primary factor used in determining yield grade, can be predicted in live animals with moderate accuracy and finding a correlation between live estimate fat thickness and carcass cutability of 0.65).

34 Defendant's Exhibit 602 (concluding that approximately 25 to 35 percent of the variation in actual cutability can be accounted for on the basis of live estimates of cutability).

35 Defendant's Exhibit 631 (live animal estimates of carcass yield grades accounted for 51 and 65 percent of the variation in carcass yield and percentage of actual cutability.

36 Tr., vol. 11, at 1268-69.

We recognize that a compulsory yield grade program may cause a certain loss in flexibility by limiting packers' ability to merchandise certain kinds of carcasses, especially those that are overfat or damaged, and by precluding those packers who customarily trim exterior fat prior to grading from selling such fat as an edible byproduct. Nevertheless, the disadvantages are to be balanced against the expected beneficial effects of the program, including the creation of price signals that will induce producers to shift their resources to the production of leaner cattle.[37] This is precisely the type of situation that calls for the exercise of administrative expertise. Scientists at Texas A & M University's Agricultural Experiment Station recently compiled the data collection phase of a study designed to evaluate the prediction equation currently in use. If the Department concludes, after thorough analysis of the date, [sic] that the yield grade system is no longer suitable, the Secretary, under 7 U.S.C. § 1622(c),[38] should revise the regulations accordingly. Appellees argue that the Department acted prematurely in promulgating the new regulations before collection and analysis of the Texas data was complete. Perhaps it would have been more desirable, as a point of procedure, if the Department had waited. We

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[37] Community Economics Division, Economic Research Service, U.S. Dep't of Agriculture, *Economics of Beef Grades: Present and Proposed* [Preliminary Draft November 27, 1974].

[38] Under 7 U.S.C. § 1622(c), the Secretary is authorized and directed to "develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practice."

cannot disregard the fact, however, that the research studies previously discussed support the yield grade system currently in force.

V.

We hold that a district court reviewing regulations promulgated pursuant to the notice and comment procedure specified by 5 U.S.C. § 553(c) is not empowered to conduct a *de novo* hearing. All parties agreed, as did the District Judge, that *de novo* review was not appropriate. But our examination of the voluminous record of the trial proceedings convinces us that the district court did in fact hold a *de novo* trial[39] and that the expert evidence relating to the merits of the regulations influenced the District Judge's decision. We have thoroughly reviewed the administrative record with certain explanatory evidence and conclude that the compulsory yield provision of the new regulations cannot be set aside as arbitrary and capricious. For all of the foregoing reasons we dissolve the injunction issued by the district court and remand the case with instructions to enter a judgment declaring that the revised regulations are valid and dismissing the complaints filed by the Independent Meat Packers Association and the intervening plaintiffs.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[39] Perhaps our earlier remand for "a plenary hearing," 514 F.2d at 1120, motivated the district court to hold a full-scale trial.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INDEPENDENT MEAT PACKERS ASSOCIATION, *et al.*,
Appellees,

v. No. 75-1486

EARL L. BUTZ, Secretary of Agriculture, *et al.*,
Appellants.

INDEPENDENT MEAT PACKERS ASSOCIATION, *et al.*,
Appellees,

v. No. 75-1541

AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, etc.
Appellants.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Plaintiffs-Appellees Consumer Federation of America, National Consumers League, Americans For Democratic Action-Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO), and American Federation of Teachers (AFL-CIO), (collectively the "Consumer Group plaintiffs"/"Consumers"), hereby petition this Court for rehearing in the above-entitled actions pursuant to Rules 35 and 40 of the Federal Rules of Appellate

Procedure and Rule 7 of the Rules of this Court, and suggest that rehearing en banc may be appropriate.

By Order of May 29, 1975, the District Court permanently enjoined defendants-appellants from implementing certain revised quality grading standards for carcass beef and slaughter cattle. On appeal in this Court, the Consumer Group plaintiffs, who had consistently opposed implementation of those revisions both at the administrative level and in the District Court, urged affirmance of that Order, pointing out several specific ways in which those revisions exceeded defendants' statutory authority under the Agricultural Marketing Act, 7 U.S.C. § 1621 *et seq.*, and violated the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.*[1] Many of the statutory violations cited by the Consumers were not discussed or relied on by the District Court, but they still provided a sufficient and alternative basis for affirmance of the Judgement below. Nevertheless, this Court refused to even consider those violations, stating that since the Consumers had not filed a cross appeal, their contentions were not properly before the Court (slip op. at 17).

The Consumer Group plaintiffs did not file a cross appeal from the District Court Order because that Order gave them all the relief they had requested. The Consumers argued below that the revised quality grading standards were invalid and that defendants should be enjoined from implementing them. The District Court agreed, stating:

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[1] See pages 67-85 of the Consolidated Brief of Plaintiffs-Appellees, filed in this Court.

> In conclusion, the Court finds instances wherein the action of the United States Department of Agriculture, in promulgating revisions to rules found at 7 C.F.R. §§ 53.102, 53.104, 53.105 and 53.203 to 53.206 [the yield and quality regulations], was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," entitling plaintiffs to injunctive relief pursuant to 5 U.S.C. § 706(a)(A). [395 F.Supp. 923, 933].

In refusing to consider the Consumers' arguments, however, the panel apparently overlooked this holding and focused exclusively on a District Court finding that there was "substantial evidence" to spport the quality grade revisions (slip op. at 9, 17). The panel treated this finding as an adverse ruling on the merits which would have required the Consumers to file a cross appeal. *(Id.)*. This was a clear error of law which warrants rehearing under Rule 40 of the Federal Rules of Appellate Procedure since the Court appears to have overlooked or misapprehended clear and compelling authority to the contrary.[2]

In spite of the District Court's finding of "substantial evidence," it cannot be disputed that the Consumers obtained the relief they sought in the District Court. Consequently,

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[2] It is ironic that the Court relied on the District Court's finding of "substantial evidence" to preclude consideration of the Consumers' arguments since this finding was made after the very trial which the panel found not to have been authorized by the Administrative Procedure Act. (*See* slip op. at 20-23). If the findings made after that trial cannot support the Judgment below, then they cannot be used against the Consumer Group plaintiffs either.

they were entitled to raise on appeal any argument in support of the Judgment below without filing a cross appeal. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924); *Anderson v. Atherton*, 302 U.S. 643 (1937); *Jaffke v. Dunham*, 352 U.S. 280 (1956); 9 Moore, J. & Ward, B., *Federal Practice* ¶204.11[3] (2d Ed. 2973).[3] *See generally* Stern, Robert L., "When To Cross Appeal Or Cross Petition – Certainty Or Confusion" 87 Harv. L. Rev. 763 (1974). The case decided by this Court are in accord,[4] including *Tiedeman v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 513 F.2d 1267, 1272 (8th Cir. 1975), the only case cited by the panel in support of its refusal to consider the Consumers' arguments (slip op. at 17).

The Consumers do not assert that an evidentiary hearing was necessary to demonstrate that the revisions exceeded defendants' authority. As the Consumers stated in their Motion For Summary Judgment, the fact that the revisions exceeded defendants' authority was apparent from the administrative record and was made even clearer by the affidavits and depositions relied on by the Consumers in support of their Motion. The evidence presented at trial is relevant only because it shows that, even when given every opportunity to do so, defendants still could not explain-away the defects apparent from the administrative record. Therefore, even if the trial should not have

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[3] These cases were cited at page 80-81, n.1, of the consolidated brief of appellees.

[4] See, e.g., *Hadfield v. Ryan Equipment Co.*, 456 F.2d 1218, 1222 (8th Cir. 1972); *Chicago, Burlington & Quincy Railroad Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268 (8th Cir. 1973).

been held, this cannot be a basis for rejecting the Consumers' arguments since those arguments are, in the first instance, based upon inadequacies in the administrative record.

Because the District Court made findings which were consistent with the inadequacies pointed out in the Consumers' Motion For Summary Judgment, the trial certainly cannot be relied on to reject the Consumers' claims. For example, the Court below made an independent finding that:

> *There is, however, no evidence in the administrative record indicating a factual basis for the Department's conclusion that prices would drop at the retail level.* [395 F.Supp. at 929, emphasis in original].

Since the Agricultural Marketing Act does not authorize any revisions to the quality grading standards unless they reduce the price spread between producers and consumers, this finding established that the revisions exceeded defendants' statutory authority, even if they were supported by substantial evidence in other respects. Thus, even if the District Court trial was not authorized by the Administrative Procedure Act, the District Court still had jurisdiction to make whatever factual inquiry was necessary to determine whether defendants exceeded the scope of their authority. The Consumers asserted that defendants had exceeded their authority in Counts One and Two of their Complaint. These Counts state causes of action directly under the Agricultural Marketing Act and in no way depended upon the Administrative Procedure Act. Consequently, the available scope of review under the Administrative Procedure Act did not preclude the District Court from conducting a broader review directly under the

Agricultural Marketing Act. In *Dunlop v. Bachowski*, 421 U.S. 560, 574 (1975), the Supreme Court indicated that while factual inquiries may be limited in reviewing administrative discretion, they should not be so limited when factual determinations must be made to acertain whether an agency operated within the scope of its authority.

Because the panel erroneously viewed the District Court Order as resolving the quality grading issue against the Consumers, an thereby failed to consider the Consumers' arguments, rehearing should be granted and those arguments should be given full consideration. If the Court intends to assert a novel proposition of law by requiring appellees to file cross appeals even when they prevail below, the Consumer Group plaintiffs submit that such a radical departure from existing law should not be made without rehearing en banch.

WHEREFORE, the Consumer Group plaintiffs-appellees request that this Court grant rehearing in the above-entitled action and suggest that this issue may be proper for rehearing en banc.

Respectfully submitted,

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Dated: November 25, 1975

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1975

INDEPENDENT MEAT PACKERS ASSOCIATION, *et al.*,
Appellees,

v.

No. 75-1486

EARL L. BUTZ, Secretary of Agriculture, *et al.*,
Appellants.

INDEPENDENT MEAT PACKERS ASSOCIATION, *et al.*,
Appellees,

v.

No. 75-1541

AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, etc.
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

The Court having considered petitions for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

December 15, 1975